IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
PRESIDING JUDGE SERVITTO

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. 149663

Trial Court No. 08-002400-NZ-3

Court of Appeals No. 309258

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DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In his Response Brief, Plaintiff/Appellee Roberto Landin ("Plaintiff") starts with the results-oriented conclusion that he *must* have a cause of action because he was allegedly terminated by Defendant/Appellant Healthsource Saginaw, Inc. ("Healthsource)" for making an internal report of alleged coworker misconduct, and proceeds to mangle well-settled law to justify that conclusion. Plaintiff invites this Court to create a public policy claim for every wrongful discharge plaintiff who cannot make out a prima facie claim under applicable statutes.

But Michigan is an at-will employment state and there are only very narrow exceptions to this rule that prohibit an employer from discharging an employee in violation of public policy. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). The only potentially applicable exception to this case asks whether Healthsource terminated Plaintiff in violation for exercising a right conferred by a well-established legislative enactment that confers employment rights. Plaintiff cannot use the Public Health Code, MCL 333.20176a or 333.20180(1) ("PHC"), to answer this question because the PHC, by its very terms, incorporates the Whistleblowers' Protection Act, MCL 15.361, *et seq.*, ("WPA") as an exclusive remedy. Settled Michigan law holds that a *Suchodolski* claim cannot be based upon a statute that provides a specific remedy, because that remedy is exclusive, and any other rule would give the courts the power of the Legislature. Plaintiff admits that the WPA is incorporated into the PHC but that, because he did not act pursuant to the PHC or the WPA, the PHC is the basis of his *Suchodolski* claim. Plaintiff's contention that he is entitled to WPA-like protections, without actually complying with the WPA, is without merit because it effectively affords Plaintiff, and lower courts, the pseudo-legislative ability to amend the PHC to provide a cause of action when a claimant does not avail himself of the Legislature's chosen remedy.

Recognizing the futility of this claim, Plaintiff argues, for the first time, that various

professional codes of conduct and the Administrative Code applicable to nursing supports a public policy based *Suchodolski* claim. These new arguments should be ignored because they: have been waived and are not responsive to this Court's order; require a conclusion that *Terrien* allows non-legislative statements to form the basis of a valid *Suchodolski* claim; these statutes do not provide employment rights, let alone rights that are sanctioned by the Legislature; and there is no delegation of legislative authority to regulate employment rights to these rule makers.

As to the Court's second question – whether the WPA is the exclusive remedy under the PHC – Plaintiff's position is flawed. Plaintiff claims that because his own actions prevent him from stating a prima facie claim under the WPA, the WPA does not provide *him* with a remedy. This argument, however, improperly conflates the issue of whether a remedy is generally *available* with whether it is *viable* in a specific set of facts. No party disputes that the PHC provides a remedy in the form of a WPA claim and, therefore, Plaintiff's claim is barred. *See Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993).

Plaintiff also illogically argues that the PHC provides him with a *Suchodolski* claim even though he admits he did not act pursuant to the PHC. Plaintiff's legal argument encourages this Court to render *ad hoc* justice, and to allow lower courts to do the same. If accepted, Plaintiff's arguments would hollow out *Terrien v Zwitt*, 467 Mich 56; 648 NW2d 602 (2002); *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), and *Dudewicz*; and breathe life into the previously deceased *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 64 (1997). This Court must act to protect at-will employment.

II. PLAINTIFF FAILS TO ESTABLISH THAT A PLAINTIFF MAY MAINTAIN A WRONGFUL DISCHARGE CLAIM FOR VIOLATION OF PUBLIC POLICY UNDER MCL 333.20176A(1)(A)

The Michigan Supreme Court set forth the applicable standard for public policy wrongful discharge claims in *Suchodolski*, recognizing three narrow exceptions to an employer's right to

terminate an at will employee if it would violate public policy: (1) where explicit legislative statements prohibit discharge of employees who act in accordance with a statutory right or duty; (2) where the employer discharges an employee because the employee fails or refuses to violate the law; or (3) where the employee is discharged because he exercises "a right conferred by a well-established legislative enactment." *Suchodolski*, 412 Mich at 695-696. The first and third *Suchodolski* prongs require a plaintiff to identify a specific legislative enactment supporting his claim. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 483-487; 516 NW2d 102 (1994). The third *Suchodolski* prong additionally requires a plaintiff to establish, among other things, that he exercised a right conferred by a well-established legislative enactment. *Turner v Munk*, 2006 WL 3373090 (No 270532) (Mich App, Nov 21, 2006) (Appx. 43). Plaintiff admits that the statute identifying a public policy under either prong must prevent discharge for protected activity. (Pl. Br. 40; *Psaila v Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003).

Plaintiff also argues, for the first time, that his conduct is covered by a variety of other sources such as the Michigan Constitution and licensing provisions of the Michigan Administrative Code, all of which create the convoluted "evolutionary path" to Plaintiff's *Suchodolski* claim (Pl Br 29-33).

A. Plaintiff Cannot Establish That The Public Health Code Creates A Claim Under The First *Suchodolski* Exception.

Suchodolski's first exception is met where explicit legislative statements prohibit the discharge of employees who act in accordance with a statutory right or duty. In reaching the conclusion that he has a valid claim, Plaintiff effectively ignores *Dudewicz*, 443 Mich at 78. There, the Supreme Court held that the remedies provided by statute for violation of a right having no common-law counterpart are exclusive. *Dudewicz*, 443 Mich at 78. Where a statute prohibits retaliatory discharge provides the right to sue, a claimant may not assert a public policy

claim. *Dudewicz* eliminated the first *Suchodolski* exception. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481; 516 NW2d 102 (1994). While the Legislature may properly identify public policy and confer employment rights on a victim discharged in violation of policy, such a claim may not be based upon a statute that provides specific rights and remedies because those rights are exclusive. Otherwise, every at-will employee alleging that his discharge violates a statute would also have a parallel public policy claim. Because it is undisputed that the PHC contains a specific prohibition against discharge and incorporates the WPA as a remedy, the PHC cannot be the basis of a prong (1) claim.

B. Plaintiff Cannot Establish That The Public Health Code Creates A Claim Under The Third *Suchodolski* Exception.

To come within the third *Suchodolski* exception, Plaintiff must show he was terminated for exercising a right conferred by a well-established legislative enactment directed at conferring employment rights. *Suchodolski*, 412 Mich at 696. Both the Court of Appeals and Plaintiff admit that "Landin merely internally reported malpractice and did not make a report to a public body under the PHC" but also maintain that the very same statute that he did not exercise rights under forms the basis of his type (3) claim *because* he did not exercise his rights under it (Pl Br 48; Appx. 8, p. 24a-26a). But under *Suchodolski,* Plaintiff cannot base his claim upon a well-established legislative enactment *that he admits did not apply to him and that he did not act pursuant to*. Plaintiff's citation to numerous other statues and alleged sources of policy are unavailing: a plaintiff must do more than identify a statute. To fulfill the requirements of prong 3 *Suchodolski* claim, Plaintiff must actually act pursuant to that statute. Because Plaintiff failed to do so here as to all of the statutes he cites, he does not have a prong 3 claim.

C. The Code Of Nursing Ethics And The Administrative Code's Regulation Of The Nursing Profession Do Not Provide The Basis For a *Suchodolski* Claim.

Plaintiff argues that the American Nurses Association's ("ANA") Code of Nursing Ethics

forms the basis of an undefined *Suchodolski* exception (Pl Br 32-37) because *Terrien* allegedly encourages the use of such codes to *indicate* public policy and that these standards are not privately created standards but are somehow "subsumed within the regulation of nurses, and referenced in the Michigan Administrative Code" (*Id*. at 28-29, 35, n 48). Plaintiff also states the Administrative Code consists of "legislatively adopted" rules and regulations demonstrating legislative public policy to guarantee that nurses perform their professional responsibilities through a licensing and regulation scheme (Pl Br 38-42).

Neither of these arguments should be considered because Plaintiff never previously asserted them. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). But they also substantively fail. First, Plaintiff's analysis of *Terrien* is wrong. *Terrien* did not address whether there was a viable *Suchodolski* claim, it determined whether restrictive covenants on residential properties violated public policy. *Terrien*, 467 Mich at 58. But it is critical to understanding that public policy is not the equivalent of the personal preferences of judges, given that:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's. *Terrien*, 467 Mich at 66-67 (citations omitted).

While *Terrien* allows the possibility for administrative rules and rules of professional conduct to *indicate* public policy, they must still, at a minimum, be "clearly rooted in the law" and be "adopted by the public through our various legal processes." Other than conclusory statements, Plaintiff has provided no evidence that either newly-identified source for his *Suchodolski* claim is a constitutionally sanctioned Legislative act.

Second, even if these sources are somehow pronouncements of Michigan public policy, Plaintiff admits they must still comply with *Suchodolski,* which requires legislative statements of

public policy that prohibit discharge for internally reporting alleged coworker misconduct (Pl Br 40). Plaintiff has not demonstrated that either source prohibits discharge of an employee for making an internal report of alleged malpractice. *Psaila*, 258 Mich App at 392. Plaintiff starts with his conclusion – that he has stated a claim by pointing to *a* supposed public policy of the state of Michigan – and ignores the fact that none prohibit discharge under the relevant facts.

Suchodolski affirmed the dismissal of a public policy claim where the plaintiff alleged he was terminated for internally reporting misconduct that he was required to report by his ethical "duties" created by a "private association." *Suchodolski* 412 Mich at 696-697. Plaintiff's arguments here are no different. *Grant v Dean Witter Reynolds, Inc*, 952 F Supp 512, 515 (ED Mich 1996) (statute explains professional duties but does not confer any employment rights).

Third, Plaintiff's arguments require this Court to find that the Legislature delegated its authority to the ANA and Nursing Board. The Michigan Constitution, however, requires that all legislation must be introduced in bill form, and must be passed by a majority of each house and then signed by the governor. Mich Const 1963 Art IV §§ 1, 22, 26, 33. Rulemaking authority of State agencies and other non-legislative bodies must come from the legislature and "[t]he legislature cannot delegate its power to make a law;" it can only delegate power to determine a fact upon which the law makes its action depend. *Charter Township of Northville v Northville Public Schools*, 469 Mich 285, 304 (2003) (emphasis added). If Plaintiff is suggesting, as he seems to, that the Legislature delegated its authority to the ANA or to the Board of Nursing to determine Michigan public policy and/or whether an employer can lawfully discharge an employee, Plaintiff has failed to demonstrate where such a delegation exists. If such a delegation does exist, it is unconstitutional because the Legislature cannot delegate its lawmaking power. Under Plaintiff's theory, every potential plaintiff who is discharged in a regulated industry, *e.g.*

accounting, healthcare, construction, would have a viable *Suchodolski* claim, whether or not the Legislature has actually adopted their codes, and every regulatory board would have the power to legislate causes of action with no action by the Legislature. Such an unbridled expansion of *Suchodolski* claims and violation of the Constitution requires rejection.

Fourth, because Michigan jurisprudence does not support his position, Plaintiff invites this Court to follow several cases from other states to justify his reasoning, *e.g.*, *Dorshkind v Oak Park Place of Dubuque*, 835 NW2d 293 (Iowa 2013). None of these cases analyze claims in light of *Suchodolski* or the specific portions of the Michigan PHC and WPA.

III. PLAINTIFF ADMITS THAT THE WPA PROVIDES THE EXCLUSIVE REMEDY FOR A CLAIM OF WRONGFUL DISCHARGE UNDER MCL 333.20176A(1)(A) AND 333.20180(1)

A. Plaintiff's Argument That He Has A Viable *Suchodolski* Claim Because He Has No Valid WPA Claim Fails As A Matter Of Law.

Plaintiff does not actually answer the Court's question regarding whether the WPA is the exclusive remedy for a wrongful discharge claim under MCL 333.20176a(1)(A) and does not even confront MCL 333.20180(1), only calling the PHC "inconsistent." Plaintiff simply concludes that the WPA cannot possibly be his exclusive remedy under the PHC because he did not engage in protected activity under the WPA and did not even act pursuant to the PHC. Despite all these astounding admissions, he argues that the PHC provides him with a *Suchodolski* claim. (Pl Br 40, n. 50, 41, n. 51, 43-45).

Plaintiff admits, at the outset, that "it is generally true that where a new right or duty is created by statute, that remedy is exclusive" (Pl Br 5). But he argues, citing *Mack v City of Detroit*, 254, Mich App 498, 658 NW2d 492 (2002), that a remedy somehow becomes null and void where a plaintiff cannot successfully plead a prima facie case under that remedy. Citing *Dudewicz*, Plaintiff argues: (1) because he did not act according to the PHC and WPA, the WPA

cannot be his exclusive remedy; and (2) in *Dudewicz* this Court only found it to be the plaintiff's exclusive remedy because it provided relief (Pl. Br. 44, 46-47). Both arguments lack merit.

First, pursuant to MCL 333.20180(1) of the PHC, the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy when they make a "report or complaint including . . . a violation of this article." *Parent*, 2003 WL 21871745 at *3. That is precisely what Plaintiff did when he reported the alleged malpractice of his coworker, so the rule from *Dudewicz* applies: because the Legislature has adopted an exclusive remedy for a retaliatory discharge in violation of PHC, it cannot form the basis of a *Suchodolski* claim.

Second, Plaintiff conflates the concepts of an available remedy with a successful claim under that remedy. The remedy of the WPA was available to Plaintiff. Due to Plaintiff's own inaction, however, he could not successfully prove a prima facie WPA clam. His failure, however, does not allow him to get around the "exclusivity" of the remedy. *Dudewicz* does not state that the key factor in exclusivity is whether the plaintiff can make out a *viable prima facie claim* under a given statute; but rather, the key factor is whether the given statute generally provides an *available remedy* for the statutorily prohibited conduct. *Dudewicz*, 443 Mich at 79 (focusing on the "*existence* of the specific prohibition" against retaliatory discharge). Cases in which Michigan courts have sustained a public policy claim do not involve statutes that specifically proscribe retaliatory discharge, but where the statutes prohibit discharges there is no public policy claim. *Id.* at 79-80. Based on this reasoning, *Dudewicz* held that: "A public policy claim is sustainable…only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Id.* at 80. Because the *existence* of available relief in a statute, not its *viability*, precludes relying on that statute for a public policy claim, Plaintiff's argument that he was not protected under the WPA fails. The fact that he did not act

in accordance with the exclusive remedy provided by the PHC is irrelevant. Plaintiff's failure to act in accordance with the exclusive remedy does not give him greater rights than someone who acted in accordance with that remedy, and that failure does not grant him a public policy claim as a consolation prize. Nor does *Pompey v General Motors Corp*, 385 Mich 537 (1971) assist Plaintiff. There, this Court held that the now-repealed Fair Employment Practices Act, which did not allow for a private cause of action, was not an exclusive remedy and therefore did not bar a plaintiff from pursuing damages for employment discrimination. *Pompey*, 385 Mich at 560. In contrast here, the PHC and WPA do allow for the pursuit of damages in a private cause of action. Accordingly, denying Plaintiff a public policy claim here is fully consistent with *Pompey*.

Plaintiff cites *Driver v Hanley*, 226 Mich App 558; 575 NW2d 31 (1997) and *Hall v Consumers Energy Co*, No. 259634, 2006 WL 1479911 (Mich App May 30, 2006) in support of his claim that because he cannot establish a prima facie WPA claim, he should be rewarded with a public policy claim based on the very same conduct. Both the *Driver* and *Hall* panels, however, fell into the same trap as the Court of Appeals in this case – they conflate the issue of whether the WPA allows for a private cause of action with whether a particular plaintiff can actually establish all elements of a WPA claim. In so doing, they run afoul of *Dudewicz* and *Suchodolski*. The fact that a plaintiff fails to take all the actions necessary to establish a prima facie claim under the WPA does not mean that he has no remedy – it means he failed to take advantage of the exclusive remedy provided by the Legislature. If Plaintiff's arguments are correct (they are not), every plaintiff who cannot plead a *prima facie* Elliott-Larsen Civil Rights Act ("ELCRA") claim – perhaps, because they are independent contractors, and not employees – will argue that because the ELCRA provides no remedy, they have public policy wrongful termination claims

based on the ELCRA.[1] *See Ravikant v. William Beaumont Hosp*, No 238911, 2003 WL 22244698, *3 (Mich App Sept 30, 2003)(plaintiff's exclusive remedy was the ELCRA, even though as a non-employee he could not assert a prime facie discrimination claim).

B. Plaintiff's Argument That This Court Should Ignore *Parent* Is Meritless.

Plaintiff's only response to Healthsource's reliance on *Parent v Mount Clemens Gen Hosp*, No 235235, 2003 WL 21871745 (Mich App August 7, 2003) (Appx 51), is to argue that its conclusion is *dicta* (Pl Br. 45-46). This is false. The reasoning and analysis of the majority opinion is sound, was essential to the ruling and should be adopted here.

IV. CONCLUSION

For all of the foregoing reasons, Healthsource most respectfully requests that this Court: reverse the Published Opinion of the Court of Appeals and the Saginaw County Trial Court, grant either of Healthsource's Motions for Summary Disposition, or grant Healthsource's Motion for JNOV and determine that, Plaintiff has no valid public policy wrongful discharge claim, and that the Whistleblowers' Protection Act is the exclusive remedy for plaintiffs who are discharged in violation of the Public Health Code, MCL 333.20176a.

Respectfully submitted,

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September 16, 2015

[1] Neither *Mack* nor *Hall*, upon which Plaintiff relies so heavily, stand for the proposition that a *Suchodolski* claim can be based upon the *very same statute* that incorporates the WPA as an exclusive remedy. Accordingly, Plaintiff's attempt to twist them to meet his circumstances fails.

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CERTIFICATE OF SERVICE OF
DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

I hereby certify that on September 16th, 2015, I electronically filed Defendant-Appellant's Reply Brief on Appeal – Oral Argument Requested and this Certificate of Service with the Clerk of the Michigan Supreme Court using the TrueFiling system, which will send notification of such filing to the following; I also certify that we have sent a copy of all via email and a hard copy in the US mail as has been standard throughout this case:

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